Supreme Court, U. S.
FILED
DEC 23 1977
MICHAEL RODAK, JR., CLERK

No. 77-911

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBBINS TIRE AND RUBBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. McCREE, Jr.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deupty General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
RICHARD B. BADER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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The Solicitor General, on behalf of the National Labor Relations Board and its General Counsel,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–26A) is not yet officially reported. The memorandum opinion of the district court (App. C, *infra*, pp. 28A–34A) is not reported.

[1] Under Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), the General Counsel has "final authority on behalf of the Board, in respect of the investigation of charges and the issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *." References hereafter to "the Board" refer as well to the General Counsel acting in his independent capacity.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 27A) was entered on November 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pre-hearing disclosure of statements of prospective witnesses, obtained by the National Labor Relations Board in an investigation that has culminated in a pending unfair labor practice proceeding would "interfere with enforcement proceedings," so that the statements are exempt from disclosure under Exemption 7(A) of the Freedom of Information Act ("FOIA").

2. Whether such statements are exempt from disclosure under Exemption 5 of the FOIA as the work product of an attorney prepared in contemplation of litigation.

STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552, are as follows:

> Public information; agency rules, opinions, orders, records, and proceedings
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

> * * * * *
>
> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B)

deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

A. THE BOARD PROCEEDINGS

Upon a petition filed by the Aluminum Workers International Union, AFL–CIO ("the Union"), the Regional Director of the National Labor Relations Board conducted a representation election among a unit of employees of Robbins Tire and Rubber Company ("the Company") on October 9, 1975; 244 votes were cast for the Union, 248 against it, and 10 ballots were challenged (A. 11).[2] The Union filed timely

[2] "A." refers to the Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

objections to the election, which were investigated by the Regional Director. The Regional Director recommended to the Board that 7 of the challenged ballots be counted, and, if they did not result in the Union's receiving a majority of the votes cast, that a hearing be held on certain of the Union's objections (A. 11–24). The Board adopted the Regional Director's recommendations (A. 25–26).

Meanwhile, on March 26, 1976 the Regional Director issued an unfair labor practice complaint against the Company alleging that it had committed numerous violations of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(1), during the pre-election period, including (1) interrogating employees about their union activities; (2) promising benefits if the employees rejected the Union; (3) threatening that if the Union were selected it would discharge pro-union employees, close the plant, withdraw benefits, and refuse to bargain (A. 29–36). A hearing on the complaint was scheduled for April 27, 1976 (A. 35).

When a count of the challenged ballots failed to resolve the election in the Union's favor, it was necessary to hold a hearing on the Union's election objections. Since the conduct covered by those objections was largely identical to that covered by the unfair labor practice complaint, the Regional Director consolidated the two proceedings and set the objections down for hearing at the same time as the hearing on the complaint (A. 5).

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On March 31, 1976, the Company, invoking the Freedom of Information Act (FOIA), 5 U.S.C. 552, wrote the Regional Director requesting that he make available for inspection and copying, at least seven days prior to the start of the hearings, copies of all written statements, signed or unsigned, contained in the Board's case files with respect to witnesses that the Board intended to call (A. 38–39). The Regional Director denied this request on the ground that the information was privileged against disclosure under Exemptions 5 and 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5), (7)(A), (C) and (D) (A. 40–43). The Company appealed the Regional Director's denial to the General Counsel of the Board (A. 44–46). The General Counsel sustained the Regional Director.[3]

B. THE FOIA SUIT

On April 15, 1976, before it had received the General Counsel's decision on its appeal, the Company filed this action in the United States District Court for the Northern District of Alabama, pursuant to the FOIA, 5 U.S.C. 552(a)(4)(B), alleging that the statements sought were records that the Board was required to disclose under 5 U.S.C. 552(a)(3). The Company sought, *inter alia,* a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, an order requiring the Board to produce the requested statements for inspection and copying at least seven days

[3] A copy of the General Counsel's letter is set forth in App. E, *infra*, pp. 37A–39A.

prior to the start of the hearing, and a permanent injunction enjoining the Board from holding its hearing until this condition had been met (A. 7–8).

After a consolidated hearing on the merits of the complaint and the application for a preliminary injunction, the district court rejected the Board's claim that the statements sought were protected against disclosure under Exemptions 5 and 7, and it ordered the Board to provide the statements for inspection and copying on or before April 22, 1976, or, at the Board's election, at least five days prior to any hearing where the person making the statement or affidavit would be called as a witness (App. C *infra,* pp. 28A–34A; App. D, *infra* pp. 35A–36A).

The court of appeals affirmed (App. A, *infra*). It concluded that Exemption 7 of the FOIA, which protects against disclosure of investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, is inapplicable unless an agency makes a showing that disclosure would interfere with a particular enforcement proceeding (*id.* at 11A–12A). Since the Board had not introduced any evidence tending to show that intimidation of those witnesses giving statements to the Board was likely to occur in this case during the five days between discovery and the Board hearing, the court held that the Board had not "sustained its burden of * * * bring[ing] Exemption (7a) into play" (*id.* at 17A).

The court of appeals also concluded that Exemption 5, which protects against disclosure of " 'inter-agency

or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency,' " was inapplicable to "purely factual material such as verbatim witness statements" (*id.* at 21A, 22A). The court acknowledged (*id.* at 21A) that Exemption 5 incorporates the work-product privilege of *Hickman* v. *Taylor,* 329 U.S. 495, which generally protects even relevant and non-privileged witness statements unless production is essential to the preparation of one's case. The court reasoned, however, that the *Hickman* privilege as read into Exemption 5 "must be applied consistently with Congress' intent to protect only against disclosure of governmental policy-making processes" (*ibid.*).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding in this case that witness statements obtained by the Board during an investigation culminating in a pending unfair labor practice proceeding are not protected from pre-trial disclosure by FOIA Exemption 7(A), absent proof that intimidation of particular witnesses is likely to occur in the circumstances of the particular case, is erroneous and in direct conflict with the decision of the Second Circuit in *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F. 2d 484, certiorari denied, 429 U.S. 834, and the decisions of six other circuits that have followed *Title Guarantee.*[4]

[4] See, e.g., *Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d 145 (C.A. 1), certiorari denied, 429 U.S. 895; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, 538 F. 2d 80 (C.A. 3);

The Fifth Circuit's construction of the FOIA sanctions its use as a discovery device in unfair labor practice proceedings, despite the fact that the FOIA does not purport to affect such discovery or to override the strict limitations that the Board and the courts have traditionally placed on such discovery because of the potential for intimidation and harassment inherent in the relationship between employer and employee. The question presented here is of major importance to the proper administration of the National Labor Relations Act, and the FOIA as well. Until it is resolved by this Court, the unfair labor practice proceedings throughout the wide geographic area included in the Fifth Circuit will be seriously impeded. The Board and its General Counsel anticipate that they will receive requests for the pre-trial disclosure of witness statements in virtually all of the many unfair labor practice proceedings that arise in the Fifth Circuit. So long as the Fifth Circuit's decision remains outstanding, the Board has no practicable alternative but to postpone many of those proceedings in order to avoid irreparable injury from prehearing release. Accordingly, prompt resolution of the issue by this Court is warranted.

National Labor Relations Board v. *Hardeman Garment Corp.*, 577 F. 2d 559 (C.A. 6); *Abrahamson Chrysler-Plymouth, Inc.* v. *National Labor Relations Board*, 561 F. 2d 63 (C.A. 7); *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board*, 550 F. 2d 1139 (C.A. 9); *Climax Molybdenum Co.* v. *National Labor Relations Board*, 539 F. 2d 63 (C.A. 10). See also *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1135–1136 (C.A. 4).

1. a. Exemption 7, as originally enacted,[5] was uniformly held to cover the statements of prospective witnesses obtained during the Board's investigation of unfair labor practice charges or objections to a Board-conducted election. The courts construed Exemption 7 as intended (1) to prevent premature disclosure of the government's investigation, so that it could present its strongest case in court,[6] and (2) to protect government sources, so that persons would volunteer statements without fear of reprisal or invasion of privacy.[7] They therefore concluded that the statute did not permit disclosure of statements compiled in connection with pending Board proceedings. See *Wellman Industries, Inc.* v. *National Labor Relations Board,* 490 F. 2d 427, 431 (C.A. 4), certiorari denied, 419 U.S. 834, and cases there cited. See also *Clement Brothers Co.* v. *National Labor Relations Board,* 282 F. Supp. 540, 542 (N.D. Ga.), approved, *National Labor Relations Board* v. *Clement Brothers Co.,* 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton,*

[5] As originally enacted Exemption 7 of the FOIA protected against disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

[6] See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong, 2d Sess. 11 (1966).

[7] In enacting the original Exemption 7, Congress was particularly concerned with the problem of pre-trial disclosure of Board witness statements, for as Senator Humphrey explained (110 Cong. Rec. 17667 (1964)):

> Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing.

271 F. Supp. 591, 593–594 (D. P.R.), cited with approval, *Bristol Myers Co.* v. *Federal Trade Commission,* 424 F. 2d 935, 939 (C.A. D.C.), certiorari denied, 400 U.S. 824.

This interpretation of Exemption 7 was also based upon the conclusion that Congress had committed the matter of discovery to the Board's rule-making power.[8] The Board's rules provide that a pre-trial statement becomes available to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing * * *," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1) (1975); this rule rests on the Board's judgment that, because of the fear of reprisal from the employer or the union, employees and others would be reluctant to furnish information to the Board without the assurance that it will not be disclosed unless and until they testify at a formal hearing.[9]

b. In 1974 Exemption 7 was amended, in pertinent part, to cover:

> investigatory records compiled for law enforcement purposes, but only to the extent that the

[8] See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631 (C.A. 9); *D'Youville Manor* v. *National Labor Relations Board*, 526 F. 2d 3 (C.A. 1).

[9] See, *National Labor Relations Board* v. *Lisdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2); *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).

> production of such records would (A) interfere with enforcement proceedings * * *.

There is no indication that Congress intended this amendment to overrule the numerous cases holding that witness statements obtained by the Board in an investigation of an on-going case were exempt from disclosure under the original Exemption 7, or to enlarge the scope of discovery under the NLRA.[10] Indeed,

More than 94 percent of all unfair labor practice cases closed during fiscal year 1976 were closed prior to hearing (*National Labor Relations Board Forty-First Annual Report* 222 (1976)), and many affiants who gave statements in the remaining 6 percent of the cases were never called to testify because their testimony would have been cumulative or irrelevant to the issues ultimately framed in the complaint.

[10] The amendment was aimed, instead, at a series of decisions by the Court of Appeals for the District of Columbia Circuit in 1973–1974, which had interpreted Exemption 7 as covering any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether future enforcement proceedings were possible in that case, or even whether the information was otherwise available to the public. See *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F. 2d 370 (C.A. D.C.); *Ditlow* v. *Brinegar*, 494 F. 2d 1073 (C.A. D.C.); *Aspin* v. *Department of Defense*, 491 F. 2d 24 (C.A. D.C.); *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (C.A. D.C.), certiorari denied, 416 U.S. 993.

The colloquy between Senators Hart and Kennedy highlighted this point (120 Cong. Rec. 17039–17040 (1974)):

"Mr. Kennedy. * * * Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

"* * * As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Senator Hart, a sponsor of the amendment, explained (120 Cong. Rec. 17033 (1974)) that the original purpose of Congress in enacting Exemption 7 was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have," and that the amendment would continue to bar disclosure:

> First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not

"Mr. Hart. The Senator from Massachusetts is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do."

Senator Hart also stated, at another point (*id.* at 17033):

"Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption."

He added (*id.* at 17034):

"This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information."

> in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding * * *."

c. Accordingly, the courts of appeals considering this question have uniformly—with the exception of the Fifth Circuit—adopted the reasoning of the Second Circuit in *Title Guarantee, supra,* 534 F. 2d at 491, that prehearing disclosure of statements obtained from employees and their representatives would "interfere" with pending enforcement proceedings in two ways: "first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *." It has therefore been held in circuit after circuit that "[d]iscovery with respect to government witnesses is restricted in recognition of

[11] Although Senator Hart added (*ibid.*) that, "it is only relevant to make such determination in the context of a particular enforcement proceeding," he did not discuss the type of showing that would be required in the particular case, nor foreclose the possibility that, as with witness affidavits in Board enforcement proceedings, interference with the law enforcement proceeding could be inferred from the nature of the documents sought.

the peculiar character of labor litigation: the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son,* v. *National Labor Relations Board,* 538 F. 2d 80, 83 (C.A. 3). In Board proceedings, the statutory criterion of harm to the particular enforcement proceeding is inferred, because "[t]he labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings." *Climax Molybdenum Co.* v. *National Labor Relations Board,* 539 F. 2d 63, 65 (C.A. 10). As the Ninth Circuit concluded, "[t]here can be no doubt" that pre-trial disclosure of employee statements would have a "retarding effect on open and frank Board investigations of alleged unfair labor practices" which "would undermine labor policy as well as unduly broaden the scope of the FOIA." *Harvey's Wagon Wheel, Inc.* v. *National Labor Relations Board,* 550 F. 2d 1139, 1140.

Title Guarantee involved a request for the statements of all witnesses, but as the First Circuit held in *Goodfriend Western Corp.* v. *Fuchs,* 535 F. 2d 145, certiorari denied, 429 U.S. 895, the rationale of the *Title Guarantee* line of cases is equally applicable where the request is limited to the statements of witnesses the Board intends to call at a scheduled hearing, as in the instant case. As the *Goodfriend* court rea-

soned, whether the request is for the statements of all witnesses, or only those scheduled to testify, there is a "possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * *.' More important, whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress left to the Board." 535 F. 2d at 147. See also *New England Medical Center Hospital* v. *National Labor Relations Board,* 548 F. 2d 377, 382–383 (C.A. 1).

d. The Fifth Circuit's conclusion that the Board must introduce evidence in each case to show the likelihood of intimidation ignores the reality of labor relations. Despite the risk that prospective witnesses may be harassed and intimidated—which the court below recognized [12]—the Board would be unable to sustain the burden of proof in many cases, since intimidation (and its likely prospect) "may be subtle and not susceptible of proof." *National Labor Relations Board* v. *Hardeman Garment Corp.,* 557 F. 2d 559, 562, n.8 (C.A. 6). In other cases, meeting this burden might require the Board to reveal so much of the evidence ascertained in its unfair labor practice

[12] App. A, *infra*, p. 14A.

[13] The court indicated that the following factors, *inter alia*, would be relevant to such a showing: "whether the history of labor relations in the community and at the plant makes intimidation of the witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give" (App. A, *infra*, p. 16A).

investigation [13] that, even if the district court were ultimately to rule that the statements could be withheld, the victory would be a Pyrrhic one.

Moreover, determining on a case by case basis whether disclosure of a particular statement would interfere with NLRB enforcement proceedings is a task for which, as the Tenth Circuit correctly noted, the courts are "ill-fitted." *Climax Molybdenum Co., supra,* 539 F. 2d at 65. Indeed, as the First Circuit explicitly recognized, "It is difficult to conceive of a greater interference than one which would involve the courts in arbitrating the Board's control of what documents to retain and what to surrender immediately prior to an enforcement proceeding." *New England Medical Center* v. *National Labor Relations Board,* 548 F. 2d 377, 383 (C.A. 1); see also *id.* at 384.

The result of the Fifth Circuit's ruling is to transform the FOIA into a new and potent discovery tool in Board enforcement proceedings,[14] despite this

[14] The court of appeals found (App. A, *infra*, p. 8A) it "questionable that FOIA disclosure would result in an increase in discovery rights in this court," because of its holding in prior cases that Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), requires the Board to adopt discovery procedures comparable to those included in the Federal Rules of Civil Procedure. However, as the court here also recognized (*id.* at 8A and n. 11), other courts that have considered the question have concluded that the NLRA does not require the Board to adopt discovery procedures. See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631 (C.A. 9); *D'Youville Manor* v. *National Labor Relations Board*, 526 F. 2d 3 (C.A. 1).

Court's recognition that the FOIA was designed to inform the public about agency action, and not to authorize discovery or otherwise benefit private litigants. See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10. As the Second Circuit correctly concluded in *Title Guarantee, supra*, 534 F. 2d at 491–492:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160 (b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery.

2. The Fifth Circuit also erred in concluding that the witness statements were not protected by FOIA

Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

This Court has held that Exemption 5 protects documents which are "normally privileged in the civil discovery context," and that it incorporates not only the government's executive privilege, but also "the attorney work product privileg[e]." *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149. Indeed, the Senate Report on the FOIA stated that this exemption would include "the working papers of the agency attorney." S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).

As the Fifth Circuit acknowledged (App. A, *infra*, p. 21A), the witness statements requested by the Company in this case fall within the work product privilege, as defined in *Hickman* v. *Taylor*, 329 U.S. 495, because they are documents prepared in anticipation of litigation, either by attorneys or those working with attorneys. The witness statements sought here are exactly the same type of documents that were sought in *Hickman*. Accordingly, if the full privilege recognized in *Hickman* is incorporated into Exemption 5, the statements fall within the protection of that Exemption.

However, the court of appeals, concluding that "the purpose of exemption 5 was to protect agency deliberative processes" (App. A, *infra*, p. 22A), held that

"purely factual material such as verbatim witness statements must not fall within [Exemption 5]" (*ibid.*).[15] The court based its conclusion upon this Court's holding in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, that the executive privilege incorporated into Exemption 5 does not protect purely factual material from disclosure. The premise of the Court's analysis in *Mink* was its discussion of the "finite limits" of the doctrine of executive privilege, and its conclusion that—in the absence of a claim of state secrets—purely factual material would be available for discovery by private parties in litigation with the government. 410 U.S. at 87–88. Since the purpose of executive privilege is to encourage frank discussion of legal and policy matters among agency personnel by shielding such deliberations from public scrutiny, materials reflecting deliberative or policymaking processes stand on a different footing than purely factual material because disclosure of the latter would not ordinarily reveal the deliberative process.

This reasoning is not, however, applicable to the attorney work product privilege, which is not limited to materials reflecting an attorney's deliberative processes, but protects an attorney's entire course of preparation, including "interviews, [witnesses'] statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." *Hickman* v. *Taylor*, *supra*, 329 U.S. at 510–512; *see In re Murphy*, 560 F. 2d 326, 333–335 (C.A. 8). Since disclosure of factual material in an attorney's files would violate the protected status of these files no less than would the disclosure of deliberative material therein, the work product privilege, unlike executive privilege, protects both types of material.[16]

Accordingly, since the attorney work product privilege is not inherently limited to materials reflecting deliberative processes, but includes witness statements obtained by an attorney in advance of litigation, the court of appeals erred in holding that these statements were not within Exemption 5.

[15] A similar interpretation of Exemption 5 has been adopted by two other courts of appeals. *Deering Milliken* v. *Irving*, 548 F. 2d 1131, 1137–1138 (C.A. 4); *Poss* v. *National Labor Relations Board*, 96 L.R.R. M. 2984 (C.A. 10); but cf. *Brockway* v. *Department of Air Force*, 518 F. 2d 1184 (C.A. 8).

[16] Although this Court held in *Hickman* v. *Taylor*, *supra*, that, under Rule 26(b) of the Federal Rules of Civil Procedure, an attorney's mental impressions are entitled to an absolute privilege against disclosure whereas factual material gathered by him is entitled only to a qualified privilege, this distinction is irrelevant for purposes construing the scope of Exemption 5 of the FOIA. As this Court stated in *Sears*, *supra*, 421 U.S. at 149 n. 16, the test for determining whether documents come within Exemption 5 is whether they would "normally be protected in the civil discovery context," not whether the privilege is susceptible to being overcome by the special needs of a particular plaintiff, because "it is not sensible to construe the [FOIA] to require disclosure in the hypothetical situation in which the private party's claim is most compelling."

CONCLUSION

The petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
RICHARD B. BADER,
Attorney,
National Labor Relations Board.

DECEMBER 1977.

APPENDIX A

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT

No. 76–2099

United States Court of Appeals for the Fifth Circuit

Nov. 21, 1977

Appeal from the United States District Court for the Northern District of Alabama before BROWN, *Chief Judge,* GODBOLD, *Circuit Judge,* and MEHRTENS, *District Judge.**

GODBOLD, *Circuit Judge:*

This is a Freedom of Information Act (FIOA) [1] case, although it takes on the troubling coloration of a dispute about the discovery rights of respondents in National Labor Relations Board proceedings. The direct court [2] ordered the NLRB to turn over to Robbins Tire copies of all written statements of those

*Senior District Judge of the Southern District of Florida, sitting by designation.

[1] 5 U.S.C. § 552, *as amended by* Act of Nov. 21, 1974, Pub.L. No. 93–502, 88 Stat. 1561.

[2] 92 L.R.R.M. 2586 (N.D. Ala., 1976).

who will be called to testify [3] in a consolidated representation and unfair labor practice proceeding involving that company. The order required that these documents be transmitted "on or before April 22, 1976, or, at the election of the Board, on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness." [4] A panel of this court has denied the Board's motion for a stay pending appeal, and the NLRB hearing has been held in abeyance for over a year pending the outcome of this appeal. We affirm.

[1] First, there is a jurisdictional problem. The Board argues that the effect of the order to disclose statements of witnesses was to enjoin its proceeding against the company. It casts its argument as an exhaustion requirement, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938), and asserting that Robbins Tire would suffer no irreparable injury if forced to challenge the Board's action afterwards on appeal, 29 U.S.C. §§ 160(e)–(f). *See also Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974); 51 St. John's L. Rev. 251, 254 n. 17 (1977). We need not decide whether or when a district court adjudicating a FOIA claim may en-

[3] We do not know how many of those whose statements are sought here are employees of Robbins Tire, since the Board has never disclosed the materials even to the district court in camera. The court found it unnecessary to resort to in camera inspection of the statements because neither party disputed that they were prepared for use in the Board proceeding.

[4] The company had sought a longer preparation period of seven days.

join ongoing or prospective NLRB proceedings in an effort to compel the disclosure required by the Act. In this case, the district court did not enjoin the hearing. The Board argues that this was the effect of its order. But whether or not an order constitutes an injunction is a question that does not turn on the subjective importance attached to it by the defendant and his resulting action in the circumstances. Like similar orders in the more conventional discovery context, this one gave the NLRB a choice. It could produce the statements, it could proceed without resort to the testimony of these particular affiants or it could forego the hearing. While the unpalatability of this choice might well form part of the rationale for finding a substantive exemption under FOIA,[5] it cannot be transformed into a jurisdictional question by the Board's decision to hold its hearing in abeyance.

EXEMPTION 7(A)

The Board asserts that the statements of prospective witnesses fall within exemption 7(A), which protects against disclosure of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, * * *." 5 U.S.C. § 552 (b)(7)(A). The issue here is whether pre-hearing disclosure of the contents of statements made by those prepared to testify in support of the Board's case would actually "interfere" with the Board's case. In *Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d 145

[5] *See New England Medical Center Hosp.* v. *NLRB*, 548 F. 2d 377, 384 (Cal, 1976) (denying FOIA disclosure on the merits, under exemption 7(A), for the same reasons). *But see* note 29, *infra*.

(CA1) (per curiam), *cert. denied,* 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976), the First Circuit has held that it would.

[2] We think our answer can be found by ascertaining what Congress meant by "interfere," bearing in mind the dictum that FOIA was a comprehensive effort to publicize all agency action and that its exemptions are to be narrowly construed. *Department of the Air Force* v. *Rose,* 425 U.S. 352, 360–61, 96 S. Ct. 1592, 48 L. Ed. 2d 11, 21 (1976). As Judge Oakes explained in the leading case of *Title Guarantee Co.* v. *NLRB,* 534 F. 2d 484 (CA2), *cert. denied,* 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976),[6] this language was the result of a change

[6] Judge Oakes' rationale in *Title Guarantee,* which unlike our case did not involve a request limited to statements of prospective witnesses, has been persuasive enough to have formed the basis of every subsequent appellate decision under FOIA involving statements obtained by the NLRB in the course of unfair labor practice investigations. All of these cases have held exemption 7(A) applicable. *Goodfriend Western Corp.* v. *Fuchs,* 535 F. 2d 145 (CA1), *cert. denied,* 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976); *New England Medical Center Hosp.* v. *NLRB,* 548 F. 2d 377 (CA1, 1976); *Roger J. Au & Son, Inc.* v. *NLRB,* 538 F. 2d 80 (CA3, 1976); *NLRB* v. *Hardeman Garment Corp.,* 557 F. 2d 559 (CA6, 1977); *Abrahamson Chrysler-Plymouth, Inc.* v. NLRB, 559 F. 2d 1226 (CA7, 1977); *Harvey's Wagon Wheel, Inc.* v. *NLRB,* 550 F. 2d 1139 (CA9, 1976); *Waldo Hosp. Ass'n, Inc.* v. *NLRB,* No. 76–3315 (CA9, Mar. 10, 1977) [unpublished Order]; *Climax Molybdenum Co.* v. *NLRB,* 539 F. 2d 63 (CA10, 1976); *Cessna Aircraft Co.* v. *NLRB,* 542 F. 2d 834 (CA10, 1976); *Maremont Corp.* v. *NLRB,* 79 CCH Labor Cases ¶ 11,790 (CA10, Oct. 5, 1976). *But see* 45 Geo.Wash.L.Rev. 114 (1976); 51 St. John's L. Rev. 251 (1977).

Several of these cases have expanded *Title Guarantee's* protections. As noted above, *Goodfriend* extended it to refuse a request limited to statements of those who would testify at a trial

offered by Senator Hart to the 1974 amendments to the FOIA after the bill had been reported out of committee. The purpose of Senator Hart's proposal was to restore the original intent of FOIA to require the agency to make a particularized showing that an investigatory file's disclosure would harm its case in court. "[I]t is only relevant to make [the exemption 7(A)] determination," Senator Hart emphasized, "in the context of the particular enforcement proceeding."[7] By making this change, Congress sought to eliminate unfounded judicial notions that a document's mere status as investigatory and enforcement-related would be sufficient to justify nondisclosure. Thus, the legislative history of exemption 7(A) reveals a sort of procedural emphasis.[8] Such an emphasis is strongly sup-

scheduled 24 hours later. *New England* applied it to exempt (1) statements of non-employees and (2) statements obtained in closed cases bearing a close temporal and factual relationship to pending cases. *But cf. Harvey's Wagon Wheel* (remanding for an initial determination of the applicability of exemption 7(A) to non-employee statements). Finally, *Climax Molybdenum* treated *Title Guarantee* as a per se rule, eliminating any need for an in camera inspection of the statements as permitted by 5 U.S.C. § 552(a)(4)(B).

On the other hand, *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131 (CA4, 1977), while in dictum accepting the rationale of *Title Guarantee,* has refused to extend exemption 7(A) to protect affidavits in the context of a proceeding to determine only backpay claims after liability has been established.

[7] Staffs of House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93–502) Source Book: Legislative History, Texts, and Other Documents 333 (Joint Comm. Print 1975) [hereinafter cited as Source Book].

[8] Senator Hart's adoption of a prior ABA Committee proposal suggests that he was particularly concerned with refusals to disclose investigatory files from closed cases. *See* Source Book 334,

plemented by the tenor of the 1974 amendments even before Senator Hart's change. As Senator Kennedy, the principal author and floor leader of the amendments, remarked, "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions." Source Book 293.

336–39, 351. But we view this as simply a particular manifestation of the need to change the exemption to require an inquiry in each situation as to whether disclosure would actually "interfere." Perhaps closed files might be so closely related to collateral proceedings pending before the agency that disclosure of them would still interfere. *See New England Medical Center Hosp.* v. *NLRB*, 548 F. 2d 377 (CA1, 1976). Conversely, the particular concern with closed files in the legislative history does not indicate to us a determination that disclosure of files in open cases, simply because they are open, would necessarily qualify as interference under exemption 7(A). *Cf.* 45 Geo. Wash. L. Rev. 114, 124 (1976) (footnotes omitted):

"The *Title* court suggested that exemption 7(A) was enacted in 1974 to resolve the problem of the unavailability of closed investigatory files. The withholding of investigatory files pertaining to closed cases was a particularly egregious abuse of exemption 7 which exemption 7(A) certainly was designed to eliminate. The 1974 amendments, however, were not drafted in terms that require disclosure of closed files and nondisclosure of open files. Congress could have easily formulated such a distinction. The amendments were phrased instead to require agencies to establish under exemption 7(A) that interference with agency enforcement proceedings would result from disclosure. Thus, while the phraseology of exemption 7(A) assumes that nondisclosure can be justified only in the context of a pending enforcement proceeding, it requires the courts to consider whether disclosure would be harmful to that proceeding before granting a 7(A) exemption. This clearly implies that not all documents pertaining to pending proceedings are automatically exempted."

Whether or not all investigatory statements may be per se exempt for other reasons is a question we address below. The point we are making here is that it violates the intent of the Hart amendment to abdicate our responsibility to consider the specific harm to agency processes that disclosure might produce.

We move next to the more substantive inquiry of what kind of interference Congress was concerned about avoiding in each particular case. Our only real clue lies in the remarks of Senator Hart:

> [Exemption 7(A)] would apply whenever the Government's case in court * * * would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding.

Source Book 333.[9]

The first sentence here suggests that the concern was with interference in the rather broad sense of premature revelation. Support for this idea can be found in Senator Hart's earlier statement that he wanted to return to the purpose revealed in the legislative history of the 1966 Act. This purpose was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have." Source Book 332, *quoting* from H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News pp. 2418, 1428. If this is what interference means, then we would be obliged to give an FOIA plaintiff-as-public-citizen no more information than he would obtain as a private litigant engaging in discovery before the agency.

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[9] The central challenge to Senator Hart's proposal dealt with exemption 7(D) and the problems of safeguarding the confidentiality of informers so as to maintain effective law enforcement information gathering, with particular reference to the efforts of the FBI. *See* Source Book 340–43, 350–51. As a result, little further explication of "interference" exists.

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In *Title Guarantee,* for example, Judge Oakes began his analysis by observing that disclosure "would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings," given Second Circuit limitations on the duty of the Board to grant pretrial discovery. 534 F. 2d at 487. However, we think that comparative discovery is not the key to the meaning of exemption 7(A).

[3] First, it is questionable whether FOIA disclosure would result in an increase in discovery rights in this court.[10] Although the Second Circuit has held that the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures,[11] this court, emphasizing the authority of 29 U.S.C. § 160(b),[12] has held that "when good cause is shown to the Board it should permit discovery in order that the rights of all parties may be properly protected." *NLRB* v. *Rex Disposables,* 494 F. 2d 588, 592 (CA5, 1974), *citing NLRB* v. *Safway Steel Scaffolds Co.,* 383 F. 2d 273 (CA5, 1967), *cert. denied,* 390 U.S. 955, 88 S. Ct. 1052, 19 L. Ed. 2d 1150 (1968); *NLRB* v. *Miami Coca-Cola Bottling Co.,* 403 F. 2d 994 (CA5, 1968); *cf. NLRB* v. *W. R. Bean & Son, Inc.,* 450 F. 2d 93, 96 (CA5, 1971, *cert. denied,* 409 U.S. 849, 93 S. Ct. 57, 34 L. Ed. 2d 91 (1972) (*Safeway Steel* and *Miami Coca-Cola* place question within discretion of administrative law judge).[13] We have also held more specifically that statements of Board witnesses are discoverable in civil contempt proceedings that the Board brings to challenge noncompliance with appellate court decrees. *NLRB* v. *Schill Steel Products, Inc.,* 408 F. 2d 803 (CA5, 1969).[14] We conclude from these authorities that, with respect to the statements of prospective witnesses, some right to discovery exists under the National Labor Relations Act.[15] Thus, we cannot agree with the Board's assertion that disclosure of witnesses' statements would inevitably interfere with enforcement proceedings even in the sense that it would always allow litigants greater discovery than they otherwise would obtain.

[10] *Title Guarantee* recognized this problem. 534 F. 2d at 487 n. 6.

[11] *NLRB* v. *Interboro Contractors, Inc.,* 432 F. 2d 854, 859–60 (CA2, 1970), *cert. denied,* 402 U.S. 915, 91 S. Ct. 1375, 28 L. Ed. 2d 661 (1971).

[12] "[NLRB unfair labor practice proceedings] shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. * * *"

[13] The recent FOIA case of *Sealand Terminal Corp.* v. *NLRB,* 414 F.Supp. 1035 (S.D. Miss., 1976), found the *Rex Disposables* line of authorities unpersuasive arguments for FOIA disclosure because these cases had held that the Board's failure to grant discovery had been harmless error. We do not agree with this logic. We are asking whether FOIA disclosure would give a litigant earlier or greater access to investigatory files than he would otherwise have. For this purpose, it seems irrelevant whether a Board examiner's error in failing to allow pretrial discovery was harmless. Our only inquiry should be the abstract one of whether the right to discovery exists.

[14] The *Schill Steel* panel left open whether its rule would apply to Board proceedings as well, 408 F. 2d at 808, as did *Morgan Precision Parts* v. *NLRB,* 411 F. 2d 1210, 1214 & n. 5 (CA5, 1971).

[15] We deal with the work product privilege analogy below in addressing the Board's claim under exemption 5. We see no reason why the analogy should provide for any different analysis under exemption 7(A)'s "no earlier or greater access" theory than under exemption 5's express test of "not * * * available by law to a party * * * in litigation with the agency."

Title Guarantee expressly avoided relying on this analogy. 534 F. 2d at 491.

Second, focusing on comparative discovery rights, even if it gave us a clearer answer, would violate the spirit of the procedural reform sought by the Hart amendment. The change, as we have noted above, sought to require a showing that some "specific harm might result to [the government's] case from disclosure," *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1135 (CA4, 1977). If the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted "only to the extent that * * *production * * * would * * * interfere" in some way. We must interpret the exemptions to give meaning to this requirement.

Finally, tying FOIA rights to the discovery rights of the particular plaintiff presents us with a legal conundrum that suggests the improbability of such a congressional intent. In order to apply the comparative discovery test, we must look to the particular needs of the plaintiff (in order to see whether he has shown good cause for production). But the Act mandates release of information "to any person." 5 U.S.C. § 552(a)(3). For this reason, anyone's case is as strong (or as weak) as anyone else's. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S. Ct. 1504, 1513, 44 L. Ed. 2d 29, 43 n. 10 (1975): "[Plaintiff's] rights under [FOIA] are neither increased nor decreased by reason of the fact that it claims an interest in the [documents sought] greater than that shared by the average member of the public." Thus, to hold that certain groups—members of the news media, for example—are the real beneficiaries of FOIA is to create a pecking order unjustified

by the language of the statute.[16] "[A]ll citizens have a right to know" what their government is doing. S. Rep. No. 813, 85th Cong., 1st Sess. 6 (1965).[17]

[4] In sum, we reject "earlier or greater access" as a kind of interference protected against by exemption 7(A). We think that the protection against interference involves a focus not on the rights of the individual FOIA plaintiff but rather on the problems posed to the particular agency proceeding. We thus

[16] On the other hand, neither can Robbins Tire gain any leverage under FOIA from the particular unfairness caused here by what some have referred to as the Board's "trial by ambush," *see Capital Cities Communications, Inc.* v. *NLRB*, 409 F. Supp. 971, 977 (N.D. Cal., 1976).

[17] Our problem here is quite similar to that posed by exemption 5, which expressly allows the withholding of memoranda "which would not be available by law to a party * * * in litigation with the agency." 5 U.S.C. § 552(b)(5). Professor Davis has noted in this context:

"When a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, letting required disclosure depend upon the facts about the particular applicant would violate the provision that disclosure must be made to 'any person.' The agency cannot say that one person is 'any person' but that another person is not." K. Davis, Administrative Law Text § 3A.21, at 83 (1972). As a result, he says, "the courts in giving meaning to the fifth exemption have been guided less by discovery law than by the policies behind the fifth exemption." K. Davis, Administrative Law of the Seventies § 3A.21, at 92 (1976). *See also EPA* v. *Mink*, 410 U.S. 73, 86, 93 S. Ct. 827, 835, 35 L. Ed.2d 119, 131–32 (1973); *Kent Corp.* v. *NLRB*, 530 F. 2d 612, 620–21 & n. 20 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976).

The exemption 5 problem is one posed by statutory language. The analogous difficulty under exemption 7(A) results from the less persuasive context of remarks in the legislative history. We therefore feel more at liberty to fashion our own definition of interference.

proceed to an examination of the possible harms that could befall Board proceedings by pretrial disclosure of witnesses' statements.[18] Indeed, a precise reading of *Title Guarantee* reveals that this was the approach taken there. Although, as we have noted, Judge Oakes referred to the expansion of discovery rights, his finding of exemption arose not from the mere conclusion that such rights would otherwise be expanded but from the doubt that Congress intended to so expand them in view of a (judicially perceived) likelihood for interference in the proceedings that might result:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress could be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery.

534 F. 2d at 491–92 (footnotes omitted). Senator Hart's second sentence in his aforementioned explanation of

[18] The Board has the burden of proving any such harm. 5 U.S.C. § 552(a)(4)(B).

what he meant by interference (a diminished ability to collect investigatory information) suggests a similar judicial inquiry into the precise nature of the harm to the agency's case.[19]

As we have noted, *Title Guarantee* involved a request for copies of all statements, without regard to whether the affiants would be called to testify. Part of the rationale for denying the right to disclosure was "the delicate relationship which exists between employer and employees.[20] *See also Roger J. Au & Son, Inc.* v. *NLRB*, 538 F. 2d 80, 83 (CA3, 1976) ("peculiar character of labor litigation"); *Climax Molybdenum Co.* v. *NLRB*, 539 F. 2d 63, 65 (CA10, 1976) ("relationship between employer and employee is a delicate one which calls for limitations on discovery"). There is inherent in this concern an assumption that the Board would be unable

[19] We do not interpret *U.S.* v. *Murdock*, 548 F. 2d 599, 602 (CA5, 1977), as requiring any different conclusion here. The *Murdock* panel, dealing with a FOIA plaintiff being prosecuted for criminal tax violations, did go so far as to say:

"We hold the discovery provisions of the Federal Rules of Criminal Procedure and the FOIA provide two independent schemes for obtaining information through the judicial process. Although information obtained through the FOIA may be useful in a criminal trial, we find that the FOIA *was not intended* as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure." (Emphasis supplied.)

As in *Title Guarantee*, which *Murdock* cited, we think the underlying rationale lay not in the comparison of discovery rights per se but rather on the special dangers that discovery would pose to a criminal prosecution. These were so great that Congress could not possibly have intended disclosure. Whether the dangers in this different context are similar is a question we address below.

[20] Indeed, the peculiar problem of intimidation involved in such a relationship explains why the court restricted its holding to NLRB settings. 534 F. 2d at 492.

to obtain testimony from employees to aid in its prosecution if their statements would become the knowledge of their employer. Even discounting the problem that we do not know which of the affiants here are employees,[21] this sweeping assumption of intimidation is inappropriate here, where the request is limited to statements of witnesses. As this court said in *Schill Steel,* "Informers who actually testify * * * surface automatically." 408 F. 2d at 805.[22] As the First Circuit admitted in *Goodfriend,* "it may well be that [such] circumstances minimize the possible interference with the pending proceedings." 535 F. 2d at 147.[23]

In the present situation, there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness during the five days prior to the hearing,[24] done in an effort to silence him or dilute the nature of his testimony. Such harassment would constitute an unfair labor practice under 29 U.S.C. § 158(a)(4) [25]

[21] *Title Guarantee* involved employee and union affiants, making no distinction in protecting the statements from disclosure because the court felt that union representatives might also be intimidated, through premature disclosure of their negotiating position. 534 F. 2d at 485, 491. *But cf. Harvey's Wagon Wheel, Inc.* v. *NLRB,* 550 F. 2d 1139 (CA9, 1976) (remanding on this point).

[22] *Schill Steel* distinguished *NLRB* v. *Clement Bros. Co.,* 407 F. 2d 1027 (CA5, 1969), in part on the basis that the intimidation problem there resulted from the fact that the discovery sought included statements of non-witnesses, *id.* at 1030–31.

[23] In that case the court found interference in the fact that the respondent would gain discovery rights.

[24] Harassment after testimony at trial, of course, would be as likely for a witness with or without prehearing disclosure.

[25] "(a) It shall be an unfair labor practice for an employer—

* * * * * * *

NLRB v. *Scrivener,* 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). Any attorney interrogation of the affiants extending beyond "that legitimately necessary for the preparation of respondent's defense" to the underlying unfair labor practice charge would run a risk of incurring section 8(a)(1) liability. *See, e.g., NLRB* v. *Ambox, Inc.,* 357 F. 2d 138, 141 (CA 5, 1966); *Texas Industries, Inc.* v. *NLRB,* 336 F. 2d 128, 132–34 (CA 5, 1964); *NLRB* v. *Hardeman Garment Corp.,* 557 F. 2d 559, 563 n. 9 (CA 6, 1977). Nevertheless, post hoc discipline does not necessarily dissipate the anxieties of those upon whom the intimidation may be visited. We understand the Board's position in this regard, dependent as it is upon charges initiated by others before it issues its complaints. See *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 138–39, 95 S. Ct. 1504, 1510–1511, 44 L. Ed. 2d 29, 40–41 (1975).[26]

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter; * * *"

[26] On petition for rehearing in *NLRB* v. *Schill Steel Prods., Inc.,* 408 F. 2d 803, 807–08 (CA5, 1969), a panel of this court discounted this problem of intimidation during the period between discovery and trial:

"In the petition here the Board asserts that the prospect of prehearing discovery is somehow more intimidating than the prospect of discovery under the Jencks Act because it will give the employer more time to confront the informing employee. Given that the name of an informer will be revealed, we confess that we are unable to see the connection between added time and substantially greater coercion."

Id. at 807. We reach our conclusion here without considering whether we could draw the same conclusion about human nature as a matter of law in every Board proceeding as opposed to the rather unique context there of discovery in our own court. *See* note 14, *supra.*

[5, 6] However, the Board has not introduced any evidence tending to show that this kind of intimidation (either to physical or employment security) is likely to occur during the five days between discovery and the Board hearing in this case. While we do not purport to establish an exclusive set of criteria for looking at this question, there are numerous factors that bear upon such an inquiry: whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give. *See Temple-Eastex, Inc.* v. *NLRB,* 410 F. Supp. 183 (E.D. Tex., 1976) (ordering disclosure of witness statements favorable to employer).[27] Instead, the Board has asserted that in every case the potential for intimidation is so great as to require nondisclosure of all statements and affidavits. This sort of per se approach to exemption 7(A) is inconsistent with the procedural

[27] The answers to some of these sorts of questions might require in camera inspection pursuant to 5 U.S.C. § 552(a)(4)(B). *Cf. Kent Corp.* v. *NLRB*, 530 F. 2d 612, 624 n. 30 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d. 287 (1976).

Whether or not courts are "ill-fitted to make such determinations," *Climax Molybdenum Co.* v. *NLRB*, 539 F. 2d 63, 85 (CA10, 1976), is irrelevant in the face of what we perceive to be a congressional directive to do so. According to one commentator, even the experts have "strongly held and widely disparate opinions on the reality of employee fear as an inhibiting factor in securing statements from witnesses." 51 St. John's L. Rev. 251, 268 n. 92 (1977).

reform effected by the Hart amendment. FOIA requires disclosure absent the agency's ability to prove[28] the applicability of exemption 7(A) in the context of the particular proceeding involved. We hold that the Board has not sustained its burden of proving that the possibility of intimidation in this case through disclosure to Robbins Tire brings exemption 7(A) into play.[29]

EXEMPTION 7(C)

[7] Exemption 7(C) protects these statements and affidavits from disclosure only to the extent that production would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The district court rejected this claim since (1) Robbins Tire seeks disclosure only of statements taken from those scheduled to testify at the Board hearing and (2) the Board's own rules[30] allow disclosure of the statements after the direct examination of the witnesses at that hearing.

[28] The Board's per se rule would not satisfy the burden FOIA imposes even if it had resorted to the sort of conclusory affidavit employed to provide "evidence" of inevitable intimidation in *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F. 2d 1139, 1142 (CA9, 1976). The statutory scheme requires proof of adjudicative, not legislative, facts.

[29] It might be argued that the mere delay that this FOIA suit creates to the Board process of enforcing the provisions of the NLRA constitutes exemption 7(A) interference. *New England Medical Center Hosp.* v. *NLRB*, 548 F. 2d 377, 384 (CA1, 1976). But giving such scope to this exemption would result in a per se rule that any FOIA suit designed to obtain investigatory files would fail if it coincided with a scheduled hearing. For the reasons we have indicated, we think this result inconsistent with the intent of the statute as amended.

[30] 29 C.F.R. § 102.118(b)(1) (1976). This rule, which is modeled after the Jencks Act, 18 U.S.C. § 3500, applies as well to representation cases. 29 C.F.R. § 102.118(c) (1976).

We agree. The Board concedes that there is nothing unusual in the nature of personal or family details in these affidavits that suggests the need for protection. *See Title Guarantee,* 534 F. 2d at 489 n. 10 (dictum). In addition, as the district court noted, this is purely a matter of when the witnesses' statements are to be revealed, and there is therefore no privacy interest involved. "Disclosure of this same information is not an unwarranted invasion of the claimants' privacy simply because it occurs before the hearing." *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1136 (CA4, 1977). Accordingly, we need not engage in balancing privacy rights against the right of the public to be informed. *Cf. Department of the Air Force* v. *Rose,* 425 U.S. 352, 370–82 & n. 16, 96 S. Ct. 1592, 1603–1609 & n. 16, 48 L. Ed. 2d 11, 26–33 & n. 16 (1976) (exemption 6).

EXEMPTION 7(D)

[8] This exemption protects against disclosure that would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The Board asserts that section 10058.4 of its Case Handling Manual requires that the affiant "should be told the truth—that the information would be used by us in ascertaining the total picture and that this would be its only use unless and until he might be called on to give information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information." We do not know whether this "express assurance" was given here, and we question how unconditional an assurance of confidentiality it is anyway. However, employee-employer context might in some situations provide "circumstances from which such an assurance could be reasonably inferred."[31] *Cf. Texas Industries, Inc.* v. *NLRB,* 336 F. 2d 128, 134 (CA 5, 1964) (importance of preserving confidentiality of employee statements). However, as the district court held, the Board's case under exemption 7(D) fails for the same reason that exemption 7(C) fails: all the statements sought here come from those who are scheduled to testify at trial anyway. If one's identity is certain to be disclosed, we cannot characterize him as one of the sources given either express or implied assurance of confidentiality.[32]

[31] We draw these explanations of what may create confidentiality from language in the conference report on the 1974 amendments to the FOIA:

"The substitution of the term 'confidential source' in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information." Source Book 230 (Conf. Rep. No. 93–138, 93d Cong., 2d Sess. (1974)).

Of course, here the Board has offered no specific evidence concerning the Robbins Tire situation from which a court might draw such a reasonable inference. *See Title Guarantee,* 534 F. 2d at 489–90 n. 11 (dictum). Its exemption 7(D) position, like its positions regarding the exemptions already discussed, is a per se one. But the question here, too, is ordinarily one of fact. *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1137 (CA4, 1977).

[32] *Cf. Climax Molybdenum Co.* v. *NLRB,* 407 F. Supp. 208, 209 (D. Colo., 1975), *aff'd on other grounds,* 539 F. 2d 63 (CA10, 1976); *accord, Mylan Pharmaceuticals, Inc.* v. *NLRB,* 407 F. Supp. 1124,

Finally, the Board asserts that the statements and affidavits taken from prospective witnesses are protected from disclosure by exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). In contrast with its position on exemption 7(A), the Board has not met with much success with this argument. *See Title Guarantee,* 534 F. 2d at 492–93 n. 15 (dictum); *Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1138, (CA4, 1977); *Marathon LeTourneau Co.* v. *NLRB,* 414 F. Supp. 1074, 1080 (S.D. Miss., 1976).

Exemption 5, which unlike exemption 7 remained unchanged by the 1974 amendments, has been held to encompass the work-product privilege of *Hickman* v. *Taylor,* 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 154, 95 S. Ct. 1504, 1518, 44 L. Ed. 2d 29, 49 (1975); *Kent Corp.* v. *NLRB,* 530 F. 2d 612, 618 (CA5), *cert. denied,* 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976). The basic disagreement between the Board and Robbins Tire here is whether the distinction between "factual" and "deliberative" materials fashioned in *EPA* v. *Mink,* 410 U.S. 73, 87–88, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119, 132 (1972), in connection with executive privilege was intended to be or can be extended to cases involving the work-product privi-

1127 (W.D. Pa., 1976). These cases argue that all interviewees are potential witnesses and that they therefore can never be considered confidential sources. We do not express an opinion on the applicability of exemption 7(D) with respect to statements of those not scheduled to be called at the Board hearing.

lege. If in fact Congress means to incorporate *Hickman* in all its complexity into exemption 5 as a sort of direct legal transplant, the witness statements in this case would be exempt from disclosure, for *Hickman* protected even relevant and non-privileged witness statements unless production "is essential to the preparation of one's case." 329 U.S. at 511, 67 S. Ct. at 394, 91 L. Ed. 2d at 462. Since as we have noted FOIA prohibits looking at the needs of the particular plaintiff in ruling on the applicability of the exemptions, such statements would not "normally" or "routinely" be disclosed in private litigation. *Sears,* 421 U.S. at 149 & n. 16, 95 S. Ct. at 1515 & n. 16, 44 L. Ed. 2d at 46 & n. 16, *citing* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). On the other hand, if *Hickman* as applied to exemption 5 does not protect factual materials, these statements would have to be disclosed. They constitute purely factual testimony regarding events at the plant.

[9] We think that the *Hickman* privilege as read into exemption 5, like the executive privilege, must be applied consistently with Congress' intent to protect only against disclosure of governmental policy-making processes.[33] The general concern surrounding exemption 5 was to guard against stifling flexibility of viewpoints before agencies arrive at final institutional decisions. As the House Report noted the exemption was a response to testimony from agency witnesses

[33] As noted above, we must construe FOIA exemptions narrowly. *Rose,* 425 U.S. at 360–61, 95 S. Ct. at 20–21, 48 L. Ed. 2d at 21. With respect to exemption 5 in particular, see S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) ("The committee * * * has attempted to delimit the exception as narrowly as consistent with efficient Government operation.").

> that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl."

H.R. Rep. No 1497, 89th Cong, 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News, pp. 2418, 2427.[34] Since the purpose of exemption 5 was to protect agency deliberative processes, purely factual material such as verbatim witness statements must not fall within it, whether the agency urges upon us the executive or the work-product privilege. *See Deering Milliken, Inc.* v. *Irving,* 548 F. 2d 1131, 1138 (CA4, 1977).

[10] While the *Mink* Court spoke in the more conventional exemption 5 context of an assertion of executive privilege, we do not interpret its discussion to be restricted to that context. The Court described in some detail the difficult language as well as the legislative history of exemption 5. While noting the problems involved in applying discovery analogies without inquiring as to individual need,[35] the Court observed that one thing about exemption 5 was certain: "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection.'" 410 U.S. at 86, 93 S. Ct. at 836, 35 L. Ed. 2d at 132.[36]

[34] *See also* Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi. L. Rev. 761, 795 & n. 88 (1967); Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 Harv. L. Rev. 1047, 1049 & nn. 11–12 (1973).

[35] *See* note 17, *supra.*

[36] Cf. Sears, 421 U.S. at 154, 95 S. Ct. at 1518, 44 L. Ed. 2d at 49: "Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy."

Justice White supported this position by citing the House and Senate reports to which we have referred. He then articulated the deliberative-factual distinction, and in doing so cited cases such as *Soucie* v. *David,* 448 F. 2d 1067 (CADC, 1971). *Soucie* was not confined to the executive privilege context; there the D.C. Circuit was promulgating broad guidelines for the handling of the exemption 5 issue on remand. *See also Bristol-Myers Co.* v. *FTC,* 424 F. 2d 935 (CADC), *cert. denied,* 400 U.S. 824, 91 S. Ct. 46, 27 L. Ed. 2d 52 (1970) (cited in *Mink*). Finally, Justice White explained that the first version of exemption 5 had definitively exempted only "memorandums or letters dealing solely with matters of law and policy."[37] The only reason for the change in final wording was not to weaken this deliberative-factual distinction but to assure that factual material inextricably intertwined with deliberative material would also be exempt. *Mink,* 410 U.S. at 90–91, 93 S. Ct. at 837, 35 L. Ed. 2d at 134. *Mink's* extensive analysis of exemption 5 as a whole shows that the case should properly be read as an exemption 5 case, not simply an executive privilege case. It paints with a broad brush, like other decisions both before and after it. *See, e.g., National Courier Association* v. *Board of Governors,* 516 F. 2d 1229, 1242 (CADC, 1975); *Schwartz* v. *IRS,* 511 F. 2d 1303, 1305 (CADC, 1975); *Tennessean Newspapers, Inc.* v. *FHA,* 464 F. 2d 657, 660 (CA6, 1972); *Soucie, supra; GSA* v. *Benson,* 415

[37] In fact, S. Rep. No. 1219, 88th Cong., Sess. 13–14 (1964), accompanying this version noted that "there is no exemption for matters of a factual nature."

F. 2d 878 (CA9, 1969). This court has described exemption 5 in the following way:

> THE "MEMORANDUM" EXCEPTION
>
> * * * Whatever may be the scope of this exception, with its cryptic limiting phrase "which would not be available by law to a party other than an agency in litigation" * * * we think it would be a perversion of the Act to classify the materials sought in this case [OSHA training manuals] as within this provision which is designed to encourage the free exchange of ideas among government policy-makers. It was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum. *Bristol Myers Co.* v. *F.T.C.*, 424 F. 2d 935 (D.C. Cir.), cert. denied, (1970). Substance not form determines its availability by the public. * * * The subject manual is an impersonal, mass-produced statement of established policy designed to be utilized as an educational and reference tool, not for policy-making or deliberative purposes. If this material be a "memorandum" then the term would cover virtually all government documents of any description or nature. Such an interpretation would be at war not only with the plain meaning of the word but also with the spirit and purpose of the Act. Whatever the ultimate scope of this "memorandum" exception may be, we are confident that these materials would remain without its reach.

Stokes v. *Brennan,* 476 F. 2d 699, 703–04 (CA5, 1973). There is no suggestion here that the factual-deliberative distinction only defines the scope of the executive privilege. It is inherent in the purpose of exemption 5.

Indeed, we suggested the answer to this case in *Kent Corp.* v. *NLRB,* 530 F. 2d 612, 623–24 (CA5), *cert. denied,* 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976), in which we held protected under exemption 5 "final investigation reports" prepared by NLRB staff members. These reports summarized the evidence of unfair labor practices (gained by witness interviews such as those actually requested here) and recommended dispositions as to the various charges. Discussing the work-product privilege and *Hickman,* we held that even the factual information contained in these reports was protected. But our approach emphasized the deliberative nature of the report process into which these facts were integrated and contrasted these documents with the precise sort of "primary information" that is involved in this case:

> In our view, even the factual matters in these reports (which might not be protected by executive privilege) are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor,* 329 U.S. at 511, 67 S.Ct. at 393, 91 L. Ed. at 462. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials.
>
> This case is a particularly strong one for recognizing the privilege. *The contents of the reports are not primary information, such as verbatim witness testimony or objective data,* but rather are mainly reports on how the Birmingham attorneys appraised the evidence they found.

> Thus the reports consist largely of "mental impressions, conclusions, opinions, [and] legal theories" within the meaning of the Federal Rule. Such materials, if prepared in anticipation of litigation or for trial, are always protected by a properly-raised claim of work product privilege, regardless of the opposing litigant's need.

530 F. 2d at 624 (emphasis added).

Mink, Stokes, and *Kent* all admit the difficulties involved in administering a statutory standard that ordinarily turns on individual need but prohibits courts from assessing such factors in the FOIA context. *See* note 17, *supra.* Whether as in *Stokes* we resolve the problem by focusing on the word "memorandum" and concluding that factual witness statements are not encompassed within that term,[38] or whether we conclude that in constructing its exemption 5 discovery analogy Congress had no inkling of the ramifications of the qualified part of the *Hickman* privilege,[39] we cannot reconcile withholding these statements with exemption 5's narrow policy of safeguarding the thought processes of the agency as an institutional thinker.

The Board has failed to sustain its statutory burden of proof as to exemptions 7(A), 7(C), 7(D), and 5. The district court's order compelling disclosure is affirmed.

AFFIRMED.

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[38] *See also Title Guarantee Co.* v. *NLRB*, 407 F.Supp. 498, 502 (SDNY), *rev'd on other grounds*, 534 F. 2d 484 (CA2), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

[39] For a fuller description of these two approaches, see Note, supra, note 34, at 1049–51.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 76–2099

D.C. Docket No. CA76–H–528 NW

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE,

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Northern District of Alabama

Before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS, *District Judge**

*Senior District Judge of the Southern District of Florida, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was urged by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1977.

Issued as Mandate: December 13, 1977.

APPENDIX C

In the United States District Court for the Northern District of Alabama, Northwestern Division

ROBBINS TIRE AND RUBBER COMPANY, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD, DEFENDANT

CA76–H–528–NW

MEMORANDUM OF DECISION

This cause came on for hearing on April 15, 1976, on the request by plaintiff for a preliminary injunction and on the motion by defendant to dismiss, or, in the alternative, for summary judgment. Since all parties agreed that the issues presented are legal, not factual, the court entered an oral order under Rule 65 of the Federal Rules of Civil Procedure directing that the trial of this action on the merits be advanced and consolidated with the hearing on April 15, 1976, on the application for a preliminary injunction.

The following is a brief summary of the facts which are not in dispute. In connection with its investigation of a contested election and its investigation of an unfair labor practice charge, defendant secured certain affidavits and/or written statements of various individuals. On March 26, 1976, the Board set down for hearing on April 27, 1976, the complaint predicated upon the unfair labor practice charge. April 27, 1976 is also the date of the hearing concerning issues raised by the election contest.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), and defendant's rules and regulations, 29 C.F.R. § 102.117(c)(1), plaintiff on March 31, 1976, in writing requested of the Board's Acting Regional Director:

> "that copies of all written statements, signed or unsigned, contained in the Board's case files *with respect to those witnesses which the Board will call to testify* at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)." (Emphasis added.)

Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request.

By letter dated April 2, 1976, the Acting Regional Director of the Board denied plaintiff's request, asserting that the statements which were requested were privileged from disclosure by exemptions 5 and 7(A), (C) and (D) of § 552(b) of Title 5 of the United States Code. On April 8, 1976, plaintiff appealed the determination to the Board's General Counsel who has not ruled on such appeal and who is not required so to do prior to the scheduled hearing on April 27, 1976. Thereafter the complaint was filed herein which invoked this court's jurisdiction under 5 U.S.C. § 552 (a)(4)(B).

Normally a court will require the exhaustion of administrative remedies prior to entertaining jurisdiction of an action complaining of agency action. But this exhaustion principle is not without its exceptions and exhaustion rests within the sound discretion of the court. See *Ecology Center of Louisiana, Inc.* v. *Coleman,* 515 F. 2d 860 (5th Cir. 1975). Here plaintiff has promptly taken all steps available to it to

pursue its administrative review, and the court finds that the factors normally to be considered in an exception to the exhaustion principle are in plaintiff's favor here. See *McKart* v. *United States,* 395 U.S. 185 (1969). Thus, for the reason stated by the court into the record during the oral hearing on April 15, 1976, this court is of the opinion that jurisdiction has been properly invoked under the Freedom of Information Act without plaintiff being required further to exhaust its administrative review. The facts in this case are different than those in *Federal-Mogul Corporation* v. *National Labor Relations Board,* CA75–H–1945–J, decided by this court on October 17, 1975. In *Federal-Mogul* plaintiff sought to invoke this court's jurisdiction under somewhat similar circumstances, but plaintiff there had not appealed the decision of the Board's Regional Director to the Board's General Counsel either prior to initiating the action or prior to the hearing on the requested preliminary injunctive relief. Here plaintiff has promptly done all within its power to secure final agency action.

In its complaint plaintiff essentially seeks two types of relief. First, plaintiff seeks the information it requested of defendant on March 31, 1976, and secondly, plaintiff seeks an injunction against the scheduled April 27, 1976 hearing. With regard to this second request, the court is aware of the reluctance of district courts to enjoin proceedings before the National Labor Relations Board except in those rare and well defined instances where the Board may be engaged in acts which are either contrary to specific prohibitions of the National Labor Relations Act or which are in excess of its delegated powers. Neither situation is presented by the instant case, and while a violation of the Freedom of

Information Act may be another exception to the general rule, enjoining proceedings before the Board is not appropriate where other, more normal relief will be sufficient. The court is of the opinion that plaintiff may be adequately protected by required production of information to which it may be entitled under the Freedom of Information Act without the assistance of an injunction directed at the April 27, 1976 hearing, and thus plaintiff will suffer no irreparable injury by the hearing.

It is important to note that the Board does not claim that there is something unusual about the affidavits or statements or that there is something within them that would cause them to be anything other than an average statement obtained during a routine investigation. The Board's attorney stated during the oral hearing on April 15, 1976 that, for the purposes of deciding this case, the court could assume that the Board's position is predicated simply upon the fact that the statements were obtained in connection with a pending matter. Thus, an *in camera* inspection of the statements will not be necessary.

There is no dispute that plaintiff is entitled to the information it has requested unless defendant can discharge the burden it has of establishing that the information falls within one of the specific exemptions contained in the Act. Even prior to the 1974 Amendment to the Freedom of Information Act, the Fifth Circuit Court of Appeals had established that the disclosure of material in government files was the rule, not the exception, and that the Act was intended to increase public access to records except under specific, narrowly constructed exemptions. *Stokes* v. *Brennan,* 476 F. 2d 699 (5th Cir. 1973). Certainly no less can be said for

the Freedom of Information Act following the 1974 Amendment.

The first exemption defendant seeks to assert is the one established by 5 U.S.C. § 552(b)(5) for inter-agency or intra-agency memorandums or letters. The Board does not argue that the statements and affidavits are in the form of "memorandums" or "letters." See *Bellingham Frozen Foods* v. *Henderson,* 91 LRRM 2761 (W.D. Wash. 1976). Neither does the Board urge that the statements and affidavits possess a deliberative, as opposed to factual quality. See *Title Guarantee Company* v. *N.L.R.B.,* 90 LRRM 2849 (S. D. N.Y. 1975) [rev'd on other grounds, —— F. 2d —— (2nd Cir. 1976)]. And this court is of the opinion that normal, routine affidavits and statements taken from persons not employed by the Board during a typical investigation by the Board are not embraced in the § 552(b)(5) exemption. See *Stokes* v. *Brennan,* supra.

As noted earlier, counsel for the Board acknowledged during the April 15, 1976 hearing that there is nothing unusual about or contained in the affidavits and statements which it declines to supply. Thus in urging an exemption under § 552(b)(7)(C) or § 552(b)(7)(D), the Board must be able to support a position that any statement or affidavit which it holds in connection with an open file is embraced within one of such exemptions. This it cannot do. The Board does not discharge the burden cast upon it in claiming one of such two exemptions simply by showing that the writing sought is in affidavit or statement form taken from a person who will testify at a forthcoming hearing. See *Bellingham Frozen Foods* v. *Henderson,* supra. This is particularly true where, as here, the

only statements or affidavits sought are from persons who will be called to testify at the April 27, 1976 hearing and under the Board's own rules, affidavits and statements of any witness must be supplied immediately after the witness has testified. 29 C.F.R. § 102.118(b)(1).

The final matter to be considered is the one exemption the Board asserts most strongly and the one, if any, to which it may be entitled. 5 U.S.C. § 552(b)(7)(A). Defendant relies primarily upon the recent decision of the Second Circuit Court of Appeals in *Title Guarantee Company* v. *N.L.R.B.,* —— F. 2d —— (2nd Cir. 1976). There, Title Guarantee Company had requested copies of *all* written statements contained in the Board's file and any such statements subsequently available to the Board. Satisfying the burden of demonstrating that this broad request interferes with the Board's enforcement proceedings (where none of the persons who gave the statements might be called as witnesses and thus where none of the statements might ultimately be supplied to the company under the Board's own rules) is substantially easier than satisfying the burden the Board bears in the instant case where the *fact* of disclosure of the statements is not the issue but simply the *time* at which the disclosure will be made. The request here is limited only to those statements of persons who will testify and thus the Board will be required by its own rules immediately after the testimony is given to deliver the statements here in issue to plaintiff. 29 C.F.R. § 102.118(b)(1). And the Board has not demonstrated how the delivery to plaintiff several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceed-

ings of the Board where, in connection with those proceedings, the Board by its own rules will be required to give the statements and affidavits to plaintiff. The court is therefore of the opinion that the defendant should be required to supply the information requested in writing by the March 31, 1976 letter. An appropriate order will be entered.

Done this 16th day of April, 1976.

JAMES H. HANCOCK,
United States District Judge.

APPENDIX D

In the United States District Court for the Northern District of Alabama, Northwestern Division

ROBBINS TIRE AND RUBBER COMPANY, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD, DEFENDANT

CA76–H–528–NW

ORDER

In accordance with the Memorandum of Decision this day entered, it is hereby *ordered, adjudged, decreed* and *declared* that the information sought by plaintiff, i.e., written statements now or hereafter contained in the Board's case filed with respect to those witnesses which the Board will call to testify at any hearing in Cases Nos. 10–CA–11762 and 10–RC–10410, constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), with respect to which plaintiff is entitled to inspection and copying.

It is further ordered, That the Board shall turn over to the plaintiff copies of the material sought by plaintiff in its letter of March 31, 1976, for inspection and copying on or before April 22, 1976, or, at the election of the Board, on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness.

It is further ordered, That costs are taxed against defendants.

Done this 16th day of April, 1976.

JAMES H. HANCOCK,
United States District Judge.

APPENDIX E

NATIONAL LABOR RELATIONS BOARD,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., April 15, 1976.

Re: Robbins Tire & Rubber Company, Cases Nos. 10–CA–11762, 10–RC–10410.

WILLIAM M. EARNEST, Esquire,
Elarbee, Clark & Paul,
Suite 750, Coastal States Bldg.,
Atlanta, Ga. 30303.

DEAR MR. EARNEST: Your appeal from the Regional Director's refusal to furnish information you had requested by letter dated March 31, 1976, has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of April 2, 1976. Your request was construed as a pretrial discovery tactic beyond the scope of the Freedom of Information Act (hereafter, "FOIA"). *Renegotiation Board* v. *Bannercraft,* 415 U.S. 1. In this regard, the Congressional intent was to keep litigants from having greater access to file information than already existed. Inasmuch as the purpose of the FOIA was not intended to be for discovery of our file contents, and noting that the Board's Rules do not provide for discovery of any of the information you seek, the request must be denied. See *Interboro Contractors, Inc.* v. *N.L.R.B.,* 432 F. 2d 854, 857–860 (C.A. 2, 1970), cert. den., 402 U.S. 915, and *Electromec Design & Development Co.* v. *N.L.R.B.,* 409 F. 2d 631 (C.A. 9, 1969).

With respect to exemption 7(A), please be advised that the Court of Appeals for the Second Circuit in *Title Guarantee Co.* v. *N.L.R.B.*, No. 75–6119 (C.A. 2, April 2, 1976), recently upheld the Board's position that the pretrial discovery of affidavits would frustrate Agency proceedings by permitting respondents to construct defenses which would permit violations to go unremedied. In addition, the Court held that such discovery would inhibit individuals from giving information to the Board. See also, *Climax Molybdenum Co.* v. *N.L.R.B.*, 90 LRRM 3126; *Mylan Pharmaceuticals, Inc.* v. *N.L.R.B., Civ.* Action No. 76–79 (W. Pa., Jan. 28, 1976); *Harvey's Wagon Wheel, Inc., et al.* v. *N.L.R.B.*, Civ. Action No. C–75–2487 S.AW. (N.D. Cal., Feb. 5, 1976); *Capital Cities Communications Inc.* v. *N.L.R.B.*, Civ. Action No. C–75–2352 W.H.O. (N.D. Cal. Feb. 19, 1976) and *Russell Stover Candies, Inc.* v. *N.L.R.B.*, 89 LRRM 2670 (U.S.D.C. W.D. Mo.). In addition to those cases cited by the Regional Director in support of exemption 5, see also, *Jamco International, Inc.* v. *N.L.R.B.*, 91 LRRM 2446 (D.C. N. Okla., 1976), and *Hook Drugs, Inc.* v. *N.L.R.B.*, Civ. Action No. IP 76–24–C (S.D. Ind., March 5, 1976). Finally, with respect to this Agency's refusal to "sanitize" the requested information, it is our belief that such an undertaking would be impractical since it is impossible to determine exactly what part of the information would need to be deleted in order to protect our enforcement proceedings, any privacy privileges or our confidentia! sources.

Robert E. Allen, at the direction of and pursuant to the policies established by General Counsel John S. Irving, is responsible for the determination that the records you requested are privileged from disclosure under the FOIA.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

JOHN S. IRVING,
General Counsel.

U.S. GOVERNMENT PRINTING OFFICE: 1977